No. 17-1201

In The
Supreme Court of the United States

GARY THACKER and
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. Overarching Points

1.1 Shifting the Issue

The TVA has subtly recast the question that this Court accepted. That question asked whether the lower courts "err[ed] by using an FTCA-derived 'discretionary-function exception,' rather than [*Fed. Housing Admin. v. Burr*, 309 U.S. 242 (1940)], to immunize the TVA from the [Thackers'] claims."[1] The Court did not revise that question.[2] The TVA now reframes and more broadly states the issue thus: "[W]hether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary-function exception."[3] This change has at least two notable effects.

First, this reframing lets the TVA ask directly whether the separation of powers demands that it enjoy discretionary-function immunity — whatever this Court's existing precedent and whatever the statutory framework.[4] The accepted question, though, asks which of two tests governs whatever vestigial immunity the TVA does have. The importance of keeping that correct question in mind becomes

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[1] *See* Pet. i.

[2] *See Thacker v. TVA*, No. 17-1201 (U.S. Sept. 27, 2018) (granting review); *Thacker v. TVA*, No. 17-1201 (U.S. Sept. 28, 2018) (limiting review to first issue).

[3] TVA Br. 11.

[4] *See, e.g.*, TVA Br. 13, 24 ("even without an explicit statutory command").

apparent when we recognize (*see infra*, Part 1.3) that *Burr already anticipates* both the separation of powers, and immunity for truly higher-level, "policy"-laden work. The contested issue thus returns to whether the TVA has given good reason for abandoning the longstanding *Burr–Loeffler–Meyer* test in preference of a more vaguely stated discretionary-function analysis.

Furthermore, by shifting the inquiry, the TVA effectively concedes that the Eleventh Circuit's precise analysis cannot be supported. That court did not draw a discretionary-function exception from foundational separation-of-powers principles. It looked to the FTCA, specifically, and transposed its discretionary-function test to the TVA's sue-and-be-sued clause.[5] And both lower courts ignored the nearly 80-year-old framework that this Court has described in *Burr—Loeffler–Meyer*. They also took an approach that *Meyer* squarely rejected.

(The TVA insists in this vein that it is not "attempting to engraft the FTCA's discretionary function exception onto" its sue-and-be-sued clause.[6] Whatever else this assertion is meant to achieve, it seems an attempt to sidestep *Meyer*. For, in *Meyer*, this Court unanimously declined to borrow FTCA rules to expand the immunity of the sue-and-be-sued Federal Savings and Loan Insurance Corporation (FSLIC).[7] In any case, the TVA errs. It is not even

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[5] *Thacker v. TVA*, 868 F.3d 979, 981–83 (11th Cir. 2017) (Pet. App. 6a-9a).

[6] TVA Br. 14; *accord id.* at 40–41.

[7] *FDIC v. Meyer*, 510 U.S. 471, 480–83 (1994).

clear that the TVA's current analysis avoids "engrafting" from the FTCA; it is certainly not true of the Eleventh Circuit's decision. Again, that decision overtly invoked and used the "same [discretionary-function] test" as applies under the FTCA.[8])

* * *

The question before the Court is not simply "whether Congress intended to subject TVA to liability" for harm caused by its (supposedly) "discretionary" work.[9] That already avoids too much, and loads the analysis in the TVA's favor. The precise question is whether a discretionary-function test, modeled on the FTCA, displaces *Burr–Loeffler–Meyer*. Hewing to that question acknowledges the exact content of the ruling below; accounts for all the TVA's substantive concerns; and yields a conclusion that — along with carrying better practical results — stays faithful to the Constitution, statutes, and precedent.

1.2 The Conduct in Question

It is crucial to recall the specific conduct in question. Much of the TVA's argument depends, rhetorically and doctrinally, on invoking "broad responsibilities,"[10] powers, and conduct that this case does not involve. This case does not involve "eminent domain,"[11] for example, "maintaining reservoir levels

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[8] *See Thacker*, 868 F.3d at 982 (Pet. App. 6a).

[9] *See* TVA Br. 16.

[10] *Id.* at 2.

[11] *Id.* at 4, 10.

for flood control,"[12] or "chang[ing] the course of a navigable waterway."[13] It does not involve "planning for the proper use, conservation, and development of the natural resources of the Tennessee River . . . for the general social and economic welfare of the nation."[14] The Thackers do not challenge the TVA's "social, economic, and political"[15] "policy judgments"[16] in any meaningful sense of those terms. Nothing here questions the TVA's "decisions . . . as to how best to balance competing societal values and interests."[17] And it is hyperbole to suggest that holding the TVA responsible for the harm that it caused the Thackers would "shackle 'the fearless, vigorous, and effective administration of policies of government.'"[18]

These items are perhaps meant to evoke the heft and imperviousness of sovereign government — but they have nothing to do with this case.

What this case does involve, what the TVA was initially doing, is simply "replacing an overhead

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[12] *Id.* at 33; *accord id.* at 2, 34–35.

[13] *Id.* at 34.

[14] *Id.* at 2.

[15] *Id.* at 35.

[16] *Id.* at 31, 36.

[17] *Id.* at 36; *accord id.* at 13.

[18] *Id.* at 23 (quoting *Westfall v. Erwin*, 484 U.S. 292, 297 (1988) (quoting in turn *Barr v. Mateo*, 360 U.S. 564, 571 (1959)). It is equally excessive when the TVA states: "The repairs being conducted by TVA to the power transmission line in this case were specifically authorized by Congress . . . ." (TVA Br. 40.) That is obviously not so. Authorization is one thing, moreover, while impunity is another entirely.

conductor on a [power-]transmission line."[19] Or, more germanely, safely raising a dropped power line.

1.3 *Burr* Already Contemplates Immunity for "Policy"-Laden, "Governmental" Work

It is hard to overstate the importance of the next point. Which is simply this: *Burr–Loeffler–Meyer already contemplates potential immunity* for the higher-level, truly "policy"-laden work that the TVA is concerned to protect.

Specifically, *Burr* provides that "an implied restriction of the general authority" to sue and be sued may be "necessary to avoid grave interference with the performance of a governmental function."[20] And the TVA now argues that its "policy"-level work is immune under *Burr's* "governmental function" prong.[21]

Equally critical, in laying out its test, *Burr* accounted for the separation of powers. The Court there reasoned: "Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."[22]

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[19] TVA Br. 6.

[20] *Burr*, 309 U.S. at 245.

[21] *See* TVA Br. 36–40.

[22] *Burr*, 309 U.S. at 244.

This alone largely deflates the TVA's position. The TVA insists that its broadest mandate requires the freedom to make "policy" judgments unbothered by the "second-guessing" of courts and juries. That curtailing that freedom insults the separation of powers. *But* Burr *already accounts for the TVA's concerns*. It anticipates that such conduct can be immune. And it does so in full view of the constitutional allocation of powers. What, then, remains of the TVA's grievance? Only that it dislikes the stricter rule of *Burr–Loeffler–Meyer*.

* * *

Even accepting at face value all that the TVA says, in the end, the heart of its analysis retains something of raw diktat. "Not this test, *that* test." The TVA then contrives a well-written but finally *post hoc* and tendentious justification for displacing existing precedent and inferentially overwriting statutes. The TVA ultimately gives no convincing reason for abandoning *Burr–Loeffler–Meyer* for a more generally defined (and hence, in practice, presumably broader) discretionary-function immunity.

2. Separation of Powers

The TVA's core argument remains that, whatever statutes might expressly say, its discretionary functions are impliedly immune under separation-of-powers principles. The TVA also now argues that it satisfies the first and second heads of *Burr*. That is, in the TVA's view, because compelling it to answer for its (supposedly discretionary) work here would violate the separation of powers, allowing

the Thackers' lawsuit is "not consistent with the . . . constitutional scheme."[23] The TVA also argues that the Thackers' lawsuit would "interfer[e] with the performance of a governmental function."[24]

2.1 The Lower Courts Did Not Address *Burr*

The TVA did not try to prove in the lower courts that it satisfied *Burr*. (The Thackers pointed this out in their initial petition to this Court.[25]) The district court made no findings, offered no analysis, and reached no conclusions under *Burr*.[26] The Eleventh Circuit did not discuss *Burr*.[27] The TVA thus did not "clearly show," for instance, that dismissing the Thackers' suit was "necessary" to avoid "grave interference" with a "governmental function." Those are all requisites under *Burr's* second prong; but there is no record decision on any of these points for this Court to review.

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[23] TVA Br. 19.

[24] *Id.* at 36–40.

[25] Pet. 17–18.

[26] *See Thacker v. TVA*, 188 F. Supp. 3d 1243 (N.D. Ala. 2016) (Pet. App. 12a-16a).

[27] The Eleventh Circuit cited *Burr*, and *Loeffler v. Frank*, 486 U.S. 549 (1988), for the basic idea that "'sue-and-be-sued' waivers are liberally construed," but did not otherwise mention, much less analyze under, those cases. *See Thacker*, 868 F.3d at 981–83.

2.2 Separation of Powers

The TVA's separation-of-powers argument fails to persuade. The TVA writes: "There is no indication that Congress intended to subject TVA to liability for the performance of discretionary functions."[28] The TVA's argument is generally a sustained exercise in inferring a desired conclusion from what is *not* in the statutes and most pertinent case law, in the teeth of what *is*.

Rather than inferring from what Congress and this Court have not done, and imagining what they must have nonetheless "intended,"[29] we might better revisit the actual content of the statutes and case law. There is, *pace* the TVA, every indication that Congress has subjected it to garden-variety tort suits like this one.

Above all, Congress has nowhere provided the TVA with discretionary-function immunity. The FTCA, and its discretionary-function test, does not govern the TVA. (On the conclusive effect of which, one need look only to *Meyer*.) The TVA Act states that the TVA's sue-and-be-sued immunity waiver is limited only by other parts of that Act.[30] None applies here. None "specifically provide[s]"[31] — or hints at —

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[28] TVA Br. 16, 44.

[29] *E.g.*, *id.* at 15–16, 19, 44.

[30] "Except as otherwise *specifically provided* in this chapter [the Tennessee Valley Authority Act of 1933], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added).

[31] *See id.*

a discretionary-function test that limits the TVA's suability. (Which puts paid to the TVA's contention that this Court "should not presume" that the TVA Act "intended" to waive immunity for discretionary functions.[32] Had Congress wanted to append a discretionary-function exception to the TVA's sue-and-be-sued clause, after all, it could have done so expressly.) This Court moreover has explained how to test sue-and-be-sued immunity since at least 1940's *Burr*. Congress is presumed to know settled law.[33] Yet Congress has not stepped in to repudiate or revise that precedent.

Legislative history confirms that Congress expressly intended the TVA's immunity waiver to have no restrictions. The Conference Report on the bill that would become the TVA Act stated: "The House bill *placed no limitations whatever upon the suability of the [TVA]*, so that all persons who had a cause of action against the [TVA] might have their day in court."[34] A Senate amendment tried to limit the TVA's suability "solely to suits for the enforcement of contracts and the defense of property," but the "no limitations" House version "was written into the conference amendment in the interest of justice."[35]

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[32] *See* TVA Br. 44.

[33] *See generally, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (noting presumption that Congress is aware of "settled" judicial statutory interpretations).

[34] H.R. Rep. No. 130, 73d Cong., 1st Sess. at 16 (1933) (emphasis added).

[35] *Id.* at 16, 25.

Thus, Congress openly contemplated that the TVA could be liable in tort, and that nothing in the TVA Act limited the intended immunity waiver. As Representative Goss explained: "The bill creates a corporation labeled 'Tennessee Valley Authority . . . .' It is permitted . . . to sue and be sued *as would any private corporation* . . . ."[36] It is therefore certain that Congress had no "plain[] . . . purpose" to "use the 'sue and be sued' clause in a narrow sense."[37]

The FTCA's legislative history shows that Congress never intended for that Act to affect the then-existing suability of the TVA. A House Report explained: "This [bill] does not apply to the Tennessee Valley Authority, which is excluded from the bill, and therefore the bill *does not affect the existing liability of that agency to be sued in tort.*"[38]

All this cannot be lightly brushed off. "Congress' power over federal jurisdiction" is itself "an essential ingredient of separation and equilibration of powers."[39] Its "absolute" power to define that jurisdiction,[40] and to shape the limits of sovereign immunity, is at least as venerable as the TVA believes an implied discretionary-function

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[36] 77 Cong. Rec. 2252 (1933) (statement of Rep. Edward W. Goss) (emphasis added).

[37] *Burr*, 309 U.S. at 245.

[38] H.R. Rep. No. 1287, 79th Cong., 1st Sess. at 6 (1945) (emphasis added).

[39] *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998)).

[40] *Schillinger v. United States*, 155 U.S. 163, 166 (1894).

immunity to be.[41] No one denies that Congress has granted the courts jurisdiction over claims against the TVA. And this Court has said: "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction *than in exercising firmly that which the Constitution and the laws confer.*"[42]

* * *

It is ultimately less than convincing to suggest that holding an essentially commercial power company liable for mishandling a power line somehow involves the judiciary overstepping its organic limits, and interfering with Article II power, in a way that endangers the basic structure of the government. The TVA's separation-of-powers argument fails to persuade.

2.3 Additional Replies

2.3.1 *Meyer* rejected "coextensive" immunities

The TVA disagrees with part of *Meyer's* operative reasoning. In *Meyer*, a unanimous Court declined to, "[i]n essence, . . . engraft language" from

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[41] *See Cary v. Curtis*, 44 U.S. 236, 245 (1845) ("[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent . . . entirely upon the action of Congress . . . ."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (Congress "might parcel out the jurisdiction among such [inferior federal] courts, from time to time, at their own pleasure.").

[42] *See Patchak*, 138 S. Ct. at 907 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1869)) (emphasis added).

the FTCA "onto the [FSLIC's] sue-and-be-sued clause" to diminish the scope of that clause's immunity waiver.[43] The Court reasoned that doing so "would render coextensive the scope of the waivers contained in § 1346(b) [of the FTCA] and sue-and-be-sued clauses generally."[44] The Court refused to presume that Congress intended that result — particularly given the content of the relevant statutes: "Had Congress wished to achieve that outcome, it surely would not have employed the language it did in [28 U.S.C.] § 2679(a)."[45]

The TVA finds *Meyer* mistaken. It writes:

> Nor would affirming the preservation of immunity for discretionary functions make the general waiver of immunity in the TVA Act "coextensive" with the FTCA. Pets. Br. 15-16. The FTCA contains a host of other provisions not present in the TVA Act's sue-and-be-sued clause — such as restrictions on settlement authority, an administrative exhaustion requirement, a two-year statute of limitations, and prohibitions on certain causes of action.[46]

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[43] *See Meyer*, 510 U.S. at 480, 483.

[44] *Id.* at 483.

[45] *Id.*

[46] TVA Br. 41–42.

Implying a discretionary-function immunity into the TVA's sue-and-be-sued clause, the TVA continues, "would not mean that [these] other limitations reflected in the FTCA must also apply to TVA."[47]

Three replies jump to mind. First, it was not the Thackers but this Court which held that judicially appending an FTCA suability rule to a sue-and-be-sued clause would make those two immunity rules unacceptably "coextensive" — in a way that Congress could not have intended, given the laws it had actually passed. Second, when *Meyer* was decided in 1994, the FTCA contained a "host of other provisions" that, according to the TVA, would keep FTCA-based and sue-be-sued immunity from becoming effectively equivalent.[48] Yet, without regard to those "other provisions," the *Meyer* Court found that tacking an FTCA rule onto a sue-and-be-sued clause would make the two immunities unacceptably "coextensive." Third, it is plainly true that extending the FTCA's discretionary-function test to the TVA "would not mean" that the rest of the FTCA "also applied" to the TVA. But it *would* reduce the TVA's sue-and-be-sued waiver to the "same [FTCA discretionary-function] test" — and, in that critical respect, would conflate discretionary-function immunity with sue-and-be-sued law and render the two rules "coextensive."[49]

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[47] *Id.* at 42.

[48] *See* 28 U.S.C. §§ 2401(b) (limitation), 2672 (settlements), 2674 (no punitives), 2680 (exceptions).

[49] The FTCA's discretionary-function exception is not gathered from various places across the FTCA; it lives in one specific paragraph: 28 U.S.C. § 2680(a).

Here, as in *Meyer*, Congress has "expressly set out how"[50] the TVA's sue-and-be-sued clause could be modified. Namely, by adjustments "specifically provided" elsewhere in the TVA Act[51] — but, again, no other part of the TVA Act adjusts the TVA's amenability to suit, to say nothing of adopting discretionary-function immunity. The TVA proves more willing than this Court to divine congressional intent in the teeth of, and to draw rules that run directly against, the content of the laws that Congress actually passed.

2.3.2 *Dalehite and Varig Airlines*

Two strands of the TVA's approach come together in its discussion of *Dalehite v. United States*, 346 U.S. 15 (1953) and *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984).[52] The first is the TVA's willingness to draw helpful rules from an FTCA that expressly excludes it. (Though the TVA now uses more indirect reasoning to invoke the FTCA.) The second is its capacity to divine congressional intent, and then to extract rules, despite the content of the laws that Congress actually enacted. Whatever Congress did, the TVA knows better what it "intended," and, on the strength of that superior understanding, claims an immunity beyond anything that Congress has provided.

The TVA writes:

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[50] *Meyer*, 510 U.S. at 483.

[51] 16 U.S.C. § 831c(b) (Pet. App. 18a).

[52] TVA Br. 24–25.

> [T]he FTCA's legislative history, on which this Court relied in *Dalehite*, indicates that Congress understood that the government would not have been subject to suit based on the exercise of discretionary functions even without an explicit statutory command. . . . The Court explained that the exception "was drafted as a clarifying amendment . . . to assure protection for the Government against tort liability for errors . . . in the exercise of discretionary functions." [*Dalehite*, 346 U.S.] at 26-27.
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> . . . .
>
> In *Varig Airlines*, the Court reiterated that . . . the [same] exception was . . . "added to make clear that the [FTCA] was not to be extended into the realm of the validity of . . . discretionary administrative action." 467 U.S. at 810. In other words, the discretionary function exception "merely makes explicit what would otherwise be implicit." *Sea-Land*, [919 F.2d at 891] (citing *Varig Airlines*, 467 U.S. at 810), cert. denied, 500 U.S. 941 (1991) . . . .[53]

The TVA's point, of course, is that discretionary-function immunity is implicit to the law, regardless of what statutes say — and despite what this Court has said about how to analyze sue-

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[53] *Id.* at 24–26.

and-be-sued clauses. But *Dalehite* and *Varig Airlines* do not support the TVA's conclusion.

First, these cases unfold entirely inside the FTCA. They say nothing about entities outside the FTCA — entities, indeed, that the FTCA expressly excludes. They say nothing about entities (like the TVA) whose organic law restricts suability only as is "specifically provided" in that organic law. They do not "clarify[]" or change anything in the TVA Act. Even at its bedrock — that is, even accepting all that the TVA says about the importance of shielding truly "discretionary" work — the TVA's analysis still does not account for the fact that *Burr already permits immunity* for truly "governmental," "policy"-level work.[54] So that, in the end, the TVA's free-ranging, inferential analysis gives no compelling ground for abandoning a *Burr-Loeffler–Meyer* rule that stays faithful to the express statutory framework.

Second, the on-the-ground work involved here is not the sort of conduct that *Dalehite* and *Varig Airlines* considered. The challenged (and ultimately immune) conduct in *Dalehite* involved a "cabinet-level decision to institute . . . [an] export program," and the "drafting of the basic plan of manufacture" for the product in question (both growing from the country's post-war "obligations as an occupying power").[55] The challenged work in *Varig Airlines* was the "licensing"

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[54] *See Varig Airlines*, 467 U.S. at 811 ("governmental," "policy"); *Dalehite*, 346 U.S. at 36 ("Where there is room for policy judgment and decision there is discretion.").

[55] *See Varig Airlines*, 467 U.S. at 810–11; *Dalehite*, 346 U.S. at 18–21.

of certain types of aircraft, which is quintessentially "regulatory."[56] In both cases the work embodied "policy judgments."[57] Work of that sort fell within the FTCA's discretionary-function exception.

Finally, in reviewing "the FTCA's legislative history,"[58] *Varig Airlines* discussed the FTCA's discretionary-function exception and then — quoting the same congressional report that the TVA invokes here — confirmed: "On the other hand, *the common law torts* of employees of . . . all . . . Federal agencies . . . would be included within the scope of" the FTCA's immunity waiver.[59]

2.3.3 *Porto Rico*

The TVA finds support for its implicit-immunity argument in *Porto Rico v. Rosales y Castillo*, 227 U.S. 270 (1913).[60] That case, the TVA says, shows that a sue-and-be-sued clause "does not mean that Congress intended an absolute waiver" of sovereign immunity; and that "[t]his Court has long recognized that such waivers . . . are subject to implied limitations in appropriate cases."[61] Thus, the

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[56] *See id.* 809–10, 813–15.

[57] *Id.* at 811, 820.

[58] TVA Br. 24.

[59] *See Varig Airlines*, 467 U.S. at 809–10 and n.9 (quoting Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Shea)) (emphasis added).

[60] TVA Br. 17, 18, 43.

[61] *Id.* at 17 ("implied"), 43 ("absolute").

Porto Rico Court "construed" a sue-and-be-sued clause "not to waive the government's immunity from suit generally, absent its consent."[62]

Porto Rico does not advance the TVA's position. Above all else, the defendant in *Porto Rico*, the entity whose sovereign immunity was in question, was "the Government of the Island."[63] The full-blown sovereign, "endowed" with "legislative, judicial, and executive" power.[64] The "body politic."[65] The "Government of the Island" in *Porto Rico* is thus analogous to a State or to the United States itself. Indeed, the *Porto Rico* Court compared the defendant Government to those of the "organized Territories" and, specifically, to Hawaii.[66] The TVA is plainly not analogous to an integral, apex sovereign. The *Porto Rico* Court moreover *expressly distinguished* between sue-and-be-sued clauses, when used in a "grant of corporate existence" (as with the TVA), and when used in the organic law of a sovereign (which *Porto Rico* involved).[67]

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[62] *Id.* at 43.

[63] *Porto Rico*, 227 U.S. at 273.

[64] *Id.*

[65] *Id.* at 275.

[66] *Id.* at 273–74.

[67] *See Porto Rico*, 227 U.S. at 275 ("[T]he words to sue and be sued are . . . [an] expression . . . for . . . stating the right . . . which springs from a grant of corporate existence . . . . But *this does not solve the question here arising*, which is the meaning of the words in the [organic] act under consideration, for . . . words may have one significance in one context and a different signification in another.") (emphasis added).

Furthermore, no one has argued that sue-and-be-sued clauses yield immunity waivers that are "absolute" and without "implied limitation[]." The Thackers have argued only that sue-and-be-sued waivers are tested under *Burr*. Which of course recognizes "implied limitations." (The TVA says that the "entire premise of *Burr*" is "recognizing that limitations on [immunity] waivers" are "sometimes appropriate."[68] That is *a* premise of *Burr*. It is telling that the TVA accepts *Burr's* "entire premise" — while scuttling or squirming around its explicit analysis and requirements.)

Finally, *Porto Rico* predates *Burr* by 27 years. (And *Loeffler* and *Meyer* by generations.) *Porto Rico* does not override or contradict those later decisions; and, finally, says nothing about how to test the suability of an entity like the TVA.

2.3.4 The uniquely independent TVA has sued the Government

When it suits it, the TVA considers itself separate enough from Executive power. For example, the TVA has sued the Department of Energy for (essentially) breach of contract.[69] Normally, Executive agencies cannot sue one another; there is insufficient adversity, and hence no justiciable

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[68] TVA Br. 43.

[69] *TVA v. United States*, 13 Cl. Ct. 692, 693–95 (1987); *Dean v. Herrington*, 668 F. Supp. 646, 653 (E.D. Tenn. 1987). These decisions reflect the same TVA lawsuit, before (*Dean*) and after (*TVA*) an inter-court transfer.

controversy.[70] With the TVA, though, courts have reasoned that TVA's "unique independence" and "separate corporate" nature distance it from defendant Executive agencies, yielding "concrete adversity" and justiciable disputes.[71] The Eleventh Circuit reviewed such cases in 2002 and found a justiciable controversy between the TVA and the EPA.[72]

3. Miscellaneous Replies

3.1 "Governmental" and "Private" Conduct — Misreading Our Position

The TVA knocks over a straw man when it writes:

> Under petitioners' reading of the TVA Act's sue-and-be-sued clause, TVA could be sued in tort for its decisions to build dams in certain locations or to release water from a reservoir for flood control. That reading of TVA's sue-and-be-sued clause is untenable.[73]

We take no position on whether the TVA could be immune for these activities. The present inquiry does not require us to. Those things may well constitute "governmental functions" under *Burr*. And

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[70] *See TVA v. EPA*, 278 F.3d 1184, 1193–98 (11th Cir. 2002) ("general rule of non-justiciability").

[71] *See id.* at 1196–97 (discussing cases).

[72] *Id.* at 1193–98.

[73] "TVA Br. 14."

it may prove "clearly . . . necessary" to disallow certain suits that would "gravely interfere" with such functions. *Burr* would then immunize such work. But that is not this case. Those sorts of acts are not involved here. More to the point, invoking them gives no reason for overturning *Burr–Loeffler–Meyer* for a discretionary-function test that the TVA presumably thinks will yield more congenial results.

The TVA also misreads the Thackers' argument. We do not "contend" that "maintaining electric power infrastructure, as well as emergency response" are "not governmental activities."[74] They can be, and under *Burr*, in some cases they may be immune. What we argued was more specific. We said:

> [I]t is also true that the TVA "regularly exercises" non-governmental, *commercial* functions. And the TVA conduct *that is at issue here* — power generation, and *specifically the work of safely raising power lines* — is very much commercial. . . . *Even more exactly, its work in raising a power line* is the work of an electrical contractor. There is nothing significantly "governmental" in that.[75]

Maybe our point is better put like this: Not every aspect of the TVA's power business (even "maintaining . . . infrastructure") is so distinctly "discretionary" or "governmental" as to warrant

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[74] *Id.* at 14, 37.

[75] Thacker Br. 29–30 (some emphasis added).

immunity. So, too, not everything that can be called "emergency response" can be deemed "governmental."[76]

Nor do the Thackers mean to call "non-governmental" "any activity that is also performed by private entities."[77] We indeed said that "raising a power line is the work of an electrical contractor."[78] But the operative point is not that such work is open to suit because it could be done privately. Anything might be done privately (say, by a government contractor), and yet so involve the weighing of "social, economic, and political policy," the balancing of "competing societal values and interests," and so on, as to sometimes be "governmental" within the meaning of *Burr*. Our point is simply that safely raising a power line is the on-the-ground work of any ordinary electrical contractor, which involves no truly "discretionary," "policy"-level, or (in *Burr's* terms) "governmental" work. Unless those words are to be drained of useful meaning.

* * *

The critical point is that "an implied restriction of the general authority" to sue-and-be-sued — to immunize the TVA for its conduct here — is *not* "necessary to avoid grave interference" with the TVA's power-generation business. It can produce power tomorrow in the same way it has done for the

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[76] Which is apart from the circularity that plagues the TVA's "emergency response" argument.

[77] *See* TVA Br. 39.

[78] Thacker Br. 30.

past 85 years. And it can do so with the exact same tort liability as every other power company in America.

3.2 Rate-Setting and Insurance; No Grave Interference

The TVA's ability to set rates also stymies its "grave interference" argument under *Burr*. Not only *can* the TVA account for potential tort liability in its rates, *it already does so*. On a massive scale.

For example, in 2011, the TVA entered into a consent agreement with the EPA, four states, and several private groups to resolve the TVA's alleged Clean Air Act violations.[79] The settlement required the TVA to invest in upgraded pollution controls, spend at least $350 million on clean-energy projects, pay the EPA $8 million, and pay $2 million in civil penalties to Alabama, Kentucky, and Tennessee. According to the TVA's 2018 10-K Report,

> [t]he TVA Board determined that these costs would be collected in customer rates in the future, and, accordingly, the amounts were deferred as a regulatory asset. Through the end of 2018, $276 million has been paid with respect to environmental projects, $60 million has been paid to Alabama, Kentucky, North Carolina, and Tennessee, and $10 million has been paid with respect to

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[79] *Alabama v. TVA*, No. 3:11-cv-00171 (E.D. Tenn. June 30, 2011) (Doc. 20) (consent decree).

> civil penalties. The remaining deferred amounts will be charged to expense and recovered in rates over future periods as payments are made through 2027.[80]

Further, and unlike other federal entities which cannot use appropriated funds (their only source of money) to purchase liability insurance without express statutory authority,[81] the TVA's being self-funded allows it to buy liability insurance. In fact, the TVA already purchases a variety of insurance policies, including for aviation, auto, marine, and general-liability exposures.[82] The TVA recovers amounts not covered by insurance through its power rates.[83]

The TVA can always raise rates to pay, or insure against, the liability that should follow when it injures people. It is therefore hard to see how immunity from personal-injury suits is "clearly . . . necessary" to "avoid grave interference" with the TVA's work.

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[80] *See* TVA's 2018 10-K Report, at 98 (available at http://www.snl.com/Cache/395786289.pdf) (last accessed January 2, 2019).

[81] *See, e.g., Decision of Gen. Counsel Dembling*, B-158766, 1977 U.S. Comp. Gen. LEXIS 3075 (Feb. 3, 1977).

[82] *See* TVA's 2018 10-K Report, *supra*, at 90.

[83] *Id.*

3.3 "Emergency Response"

Framing this as an "emergency" response,[84] and then invoking that characterization to immunize the TVA's conduct, would bootstrap *any* malfeasance into immunity. The TVA missteps to create a hazard; it then must address that hazard; and, in so doing, it undertakes "discretionary" work that makes it impervious to responsibility. The TVA creates an emergency, in other words, and precisely by doing so shields itself from liability. That is poor logic, bad law, worse policy. When one's own challenged negligence creates an emergency, then it is circular and invariably self-immunizing to invoke that emergency as justification for avoiding suit.

Furthermore, a one-off "emergency response" will often not even interfere with the next day's work — never mind with the TVA's "broad responsibilities."

4. Practical Upshot — Complete Immunity

Finally, it is important to consider some broader and practical aspects of the TVA's position.

First, the TVA asks the Court to move backward against the long-term arc of the law. The TVA puts upside-down the law's tendency to restrict rather than broaden sovereign immunity. In 1940's *Burr*, the Court noted "the current disfavor of the doctrine of governmental immunity," and was persuaded by "the increasing tendency of Congress to

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[84] TVA Br. I, 9, 13–14, 36, 37, 39.

waive the immunity where federal governmental corporations are concerned."[85] One year earlier, the Court had taken a more sweeping historical view of governmental immunity, and offered language that remains instructive:

> [B]ecause the [sovereign-immunity] doctrine gives the government a privileged position, it has been appropriately confined.
>
> For more than a hundred years corporations have been used as agencies for doing work of the government. . . . But this *would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted*. . . .
>
> In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. . . . It is noteworthy that the oldest surviving government corporation — the Smithsonian Institution — has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day.[86]

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[85] *Burr*, 309 U.S. at 245.

[86] *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388–92 (1939) (emphasis added). In noting how courts had "confined" the doctrine of sovereign immunity, *Keifer* pointed to precedent

The Court then reversed an immunity-based dismissal.[87]

Second, there are at least two ways in which the TVA's central arguments invite a demurrer. We may accept all that the TVA says about its broad purposes and mandate, rooted in Acts of Congress. The same may be said of the Postal Service or the FSLIC — entities that, when they were created, were no less important than the TVA to the nation's commerce — and yet this Court tested their suability under *Burr*, without apparent disruption to the separation of powers.[88] We may also agree that it is important to shield from normal tort liability truly "policy"-level, "discretionary," "governmental" work — and then notice that *Burr already accounts for this*. Accept the TVA's most central urgings, and there still is no good reason to accept its fuller analysis or ultimate conclusion.

Last, the TVA's position is practically untenable. If the work challenged here — replacing an electrical conductor; raising a downed power line — if this constitutes "social, economic, [or] political" "policy judgment" for which the TVA cannot be held

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dating back at least 115 years. *See id.* at 388 n.1 (citing *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921) (discussing cases)); *see also, e.g., Bank of United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907–08 (1824) (Marshall, C.J.) ("The State of Georgia, *by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character*, so far as respects the transactions of the Bank, and waives all the privileges of that character.") (emphasis added).

[87] *Keifer*, 306 U.S. at 387–88, 397 (emphasis added).

[88] *Loeffler, supra* (Postal Service); *Meyer, supra* (FSLIC).

accountable — *then what could it ever "be sued" for?* Its sue-and-be-sued clause will have been nullified. (At least, conveniently, on the "be sued" side.) Its notionally "broad" and "liberal" suability will have vanished. The TVA pursues the end that as an entity it naturally prefers. (Everyone, corporate or individual, governmental or private, hopes to avoid tort liability.) But the TVA's reasoning is out of step with constitutional, statutory, and case law. And its position will ultimately harm the wider community that the TVA was created to serve.

CONCLUSION

The Eleventh Circuit's decision should be reversed.

Respectfully submitted,

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